EXECUTIVE SECRETARIAT

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Remarks

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Executive Secretary

5/25/84

Date

3637 (10-81)

PANEL ON THE LAW OF OCEAN USES

STAT

May 25, 1984

The Honorable William J. Casey
Director
Central Intelligence Agency
Washington D.C. 20505

Dear Mr. Casey:

I draw your attention to the attached statement on U.S. policy on the Law of the Sea. The statement is the result of study by an independent panel of citizens, recognized experts on ocean law. The policy statement is also being transmitted to the President, heads of appropriate departments of government and to members of Congress.

Sincerely,

STAT

Panel on the Law of Ocean Uses

LH:ap

Enclosure

The panel on the law of ocean uses is an independent group of specialists in oceans law and policy sponsored by Citizens for Ocean Law.

1601 Connecticut Avenue N.W., Suite 202, Washington, D.C. 20009 (202) 462-3737

PANEL ON THE LAW OF OCEAN USES

United States Policy on the Law of the Sea

1.

After fifteen years of intensive effort, the nations of the world, with full participation by the United States, produced a comprehensive Convention on the Law of the Sea. In 1982, President Reagan decided that the United States would not become a party to the Convention. But formal abstention from the Convention is hardly a complete national oceans policy for the United States. Indeed, that abstention compels the United States to attend carefully to its posture, in law and policy, toward the Convention itself and to each of its many provisions on matters of major interest to the United States.

The United States dissociated itself from the Convention essentially because of disagreement with a number of its dispositions in respect of mining in the deep sea-bed. It has not disowned the spirit and import of the Convention as a whole, or any of its other provisions.

We believe that it is in the interest of the United States to recognize the Convention as representing the normative expression by the states of the world reflecting their common or respective interests at the end of the 20th century. Leaving aside the question of deep sea-bed mining, we believe that the provisions of the Convention achieve a workable regime that would promote order at sea and satisfy the complex of competing interests of different states.

Deep sea-bed mining is still a distant prospect and is of little present economic value. U.S. reservations as to the regime for deep sea-bed mining should be the subject of continued negotiation; they should not undermine the profound and wide consensus that has been achieved otherwise. Acceptance by the United States of the Convention, and of its dispositions generally, in fact if not in form, is in the interest of the United States and of mankind.

Adopted April 27, 1984.

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Until well into this century the Law of the Sea was stable and generally agreed. Its essential principle was the freedom of the seas, which implied freedom of navigation, both civil and military, and freedom to take the sea's resources, essentially its fish. The exception to freedom for all was a small territorial sea in which coastal states exercised exclusive rights, subject to a right of innocent passage for vessels of other states.

The history of the Law of the Sea in the past half century is a history of coastal-state expansion. The United States took a large step in that direction in 1945 when it claimed the mineral resources of the continental shelf and a special interest in fisheries conservation beyond its territorial sea. Ever more firmly, other states began to claim ever-larger zones of exclusive fishing rights, sometimes larger zones of exclusive economic rights generally, or even large territorial seas.

The once clear and stable law of the sea became unclear and unstable. Coastal states became less restrained about asserting the right to control more activities of foreign vessels and foreign nationals in areas extending ever-farther from their shores. Because the maritime powers themselves took part in this expansionist trend, limiting certain freedoms off their coasts as it suited their interests, it became increasingly difficult for them to explain why any other coastal state could not restrict high seas freedoms of interest to the maritime powers to the extent it suited its interests. It became increasingly difficult to distinguish between a principled assertion of universal legal rights by the maritime powers and an attempt to impose their will, in their own interests, on other coastal states. For the United States, committed to the rule of law, it became increasingly difficult and costly to do more than protest the claims of others adverse to its maritime interests.

Although publicity and prominence were given to the distant prospect of mining the deep sea-bed, the live issues of the law of the sea have concerned authority in coastal areas. By the end of the 1960's pressures for change in the law of the sea generated two fundamental questions:

1. How much authority may a coastal state exercise, how far from its shores, for what purposes, and how much freedom is guaranteed there for other states and their nationals?

2. How could one achieve stable answers to that question, which would provide a legal foundation for exercising or enforcing rights and which all states are likely to accept and regard as legally binding over time?

One important goal of the United States in the Third U.N. Conference on the Law of the Sea was to restore order and stability to the law of the sea. It sought to achieve this goal by giving primary emphasis to three principles:

1. The rules of the law of the sea must fairly balance the respective interests of all states, notably the competing coastal and maritime interests, in a manner that is generally acceptable.

2. Multilateral negotiations on the basis of consensus should replace unilateral claims of right as the principal means for determining that balance.

3. Compulsory dispute settlement mechanisms should be adopted to interpret, apply, and enforce the balance.

The Conference succeeded in resolving the fundamental questions of the law of the sea in accordance with these three principles.

The most important question of oceans policy facing the United States is whether we will conform our behavior to that consensus. President Reagan, while rejecting the Convention on the Law of the Sea because of its system of regulating deep sea-bed mining, expressly recognized that the balance of interests achieved in the Convention in respect of coastal areas was in the interests of the United States and the international community as a whole. He announced that the United States would act in the future in a manner consistent with that balance.

It is of paramount importance that the United States scrupulously conform its behavior to the provisions of the Convention. Our rejection of the deep sea-bed mining portion of the Convention in itself inevitably tempts other states to think in terms of rejecting or making exceptions to other provisions. However, the deep sea-bed mining system is not relevant as such to the fundamental issues of coastal state rights and high seas freedoms in coastal areas. (Nor is substantial mining beyond the economic zone and continental shelf likely in the near future.) But virtually all of the other provisions of the Convention deal directly or indirectly with those fundamental issues.

If the United States begins to carve out exceptions to those provisions for itself, it may undo the balance and encourage other unilateral exceptions. If the U.S. Government makes exceptions for itself, it will inevitably be less effective in persuading other governments that they may not carve out other

exceptions that suit them, and will be increasingly less effective in persuading the American people and America's allies that decisive action is needed to ensure respect for our legal rights off foreign coasts. We will lose both an acceptable balance of rights and duties and a unique opportunity to stabilize that balance around a set of rules worked out by consensus of all the nations of the world. The new opportunity for building a universal "customary law" around the rules described by the Convention will disintegrate. Instead, there will be strong impetus for development of different rules that will entail restriction on freedom of navigation and overflights and the conduct of military activities in vast coastal areas, restrictions which are not in the interest of the United States.

5.

The only realistic hope for building a stable and acceptable "customary law" of coastal state rights and duties at this time depends on the United States respecting all the relevant rules of the new Convention and persuading others to do the same. Unless we do so, we will increasingly face three expensive choices with respect to any foreign state's claim of control over our navigation or military activities off its coast:

1. resistance, with the potential for prejudice to other U.S. interests in that coastal state, for confrontation or violence, and for domestic discord;

2. acquiescence, leading inevitably to a weakening of our position of principle with respect to other coastal states (verbal protests to the contrary notwithstanding) and domestic pressures to emulate the contested claims; or

3. bilateral negotiation, in which we will be expected to offer a political, economic, or military quid pro quo in proportion to our interest in navigation and military activities that, under the Convention's rules, can be conducted free of such bilateral concessions. (Bilateral negotiation limited to reciprocal exchange of navigation or military privileges will not succeed since most foreign states do not have the same interest in exercising navigational and military freedoms off our coasts as we have off theirs.)

6.

We recommend the following first steps:

1. The United States should adopt a clear and consistent policy, applicable to all organs of the U.S. Government,

of adherence to all of the rules of the Convention, excluding at most only those dealing with the regulation of mining by the International Sea-bed Authority. The United States need not exercise all its rights (e.g., it need not extend its territorial sea or require consent for scientific research in its economic zone if it prefers not to), but it must scrupulously respect all its duties, including the limitations on its rights.

2. The United States should encourage and urge other states, including its allies, to do the same.

3. Means should be sought to make compulsory dispute settlement an effective part of our policy and that of other nations, binding at least on the basic issues of navigation and pollution.

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